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In The

Supreme Court of the United States

TRAGER, GLASS & COMPANY,
Petitioner,

vs.

Docket No. 89 1455

JOSEPH M. NEWMYER, JOHN W. KWIATKOWSKI, JOHN C. COLLINS and TOBIN R. COLLINS,
Respondents,

vs.

TRAGER, GLASS & COMPANY,
Petitioner,

vs.

EDWARD O'CONNELL,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD REVIEW A NON-FINAL ORDER OF AN UNITED STATES APPELLATE COURT?

II.

WHETHER THIS COURT SHOULD REVIEW ISSUES WHICH WERE NOT PROPERLY BEFORE EITHER THE DISTRICT COURT OR THE COURT OF APPEALS?

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STATEMENT OF THE CASE

In November of 1986, the first of the Respondents' Complaints were filed alleging, inter alia, violations of the Federal Securities Laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In response to these complaints, four of the Defendants filed Motions to Dismiss. Before any discovery was initiated, the lower court dismissed the Plaintiffs' Complaint, holding that the investments were not securities under the Securities Exchange Acts of 1933 [15 U.S.C. Section 771] and 1934 [15 U.S.C. Section 78aa and 78j(b)]. The lower court also held that there was not a requisite pattern of racketeering activity pursuant to the Racketeer Influence Corrupt Organization Act [18 U.S.C. Section 1962].

On appeal, the Sixth Circuit reversed and remanded the case to proceed to trial in accordance with its decision.

One of the Defendants, Trager, Glass & Company, has asked this Court to grant its Petition for Writ of Certiorari to reverse the decision of the Sixth Circuit Court of Appeals relative to the securities law issue only. Respondents argue that this Court should not exercise its discretionary power in granting Writ of Certiorari on this matter.

FACTS

Respondents, for purposes of this response, will accept Petitioner's version of the facts.

ARGUMENT

Petitioner seeks review of the lower court's interlocutory order pursuant to a Writ of Certiorari under 28 U.S.C. Section 1254(1). Jurisdiction to review judgments and decrees of the Court of Appeals by certiorari is to be exercised sparingly, and only in cases of gravity and general importance, or in order to secure uniformity of decision. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 US 251, 258 (1916).

I. THE DECISION OF THE SIXTH CIRCUIT IS A NON-FINAL ORDER AND THERE ARE NO CIRCUMSTANCES WHICH WARRANT THIS COURT'S REVIEW

Although a writ may issue on an interlocutory order, the Supreme Court will not exercise its jurisdiction "unless it is necessary to prevent extraordinary inconvenience and embarrassment to the conduct of the cause". *American Construction Company* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 13 S.Ct. 758 (1893). In other words, only under the most extraordinary circumstances will the Supreme Court hear a non-final order. See, for example, *United States* v. *Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (1974). An examination of the holding of the Sixth Circuit clearly indicates the inappropriateness of Supreme Court review in this matter.

In its Petition for Writ of Certiorari, Petitioner claims:

> "The Sixth Circuit Panel (J. Merritt, J. Nelson, J. Celebrezze) determined that Plaintiffs' investment in Defendant Philatelic Leasing's tax shelter program constituted investment in a security."

The Sixth Circuit determined no such thing. What the Sixth Circuit did do, however, was to afford the Plaintiffs an opportunity to have their day in Court. The Sixth Circuit, rather than make a determination that the investment *was* a security, simply stated that it would not rule out the possibility that the investments *could* be a security. The Opinion is replete with such references:

> ". . . and if the Plaintiffs in the present litigation are able to prove their cases, the committment given by the distribution company here . . ." (p. 17).
>
> ° ° °
>
> "Having read Philatelic's offering memorandum, however, with its glowing account of the popularity of stamp collecting, we cannot rule out the possibility that Philatelic investors hoped to realize 'profits' in the true sense of the term." (p. 20).

° ° °

"These are factual questions, again, and the Defendants may ultimately prevail on them. But such questions are not to be resolved against the Plaintiffs on Motions to Dismiss — at least not on the sort of record that is before us here." (p. 21).

° ° °

"We do not come to grips with the issue here, however, given the clear possibility that at a trial of these cases, or in summary judgment proceedings, the Plaintiffs may be able to show that their arrangements with Dell got them over the commonality hurdle". (p. 23).

The decision is clearly interlocutory. If there is an issue in this case which the Supreme Court should review, this review should occur after a properly developed record.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE PETITIONER IS REQUESTING THIS COURT TO EXAMINE ISSUES WHICH WERE NOT ADDRESSED BY THE SIXTH CIRCUIT COURT OF APPEALS NOR BY THE DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

The Petitioner requests that this Court settle the issue of Horizontal versus Vertical commonality as an element in the determination of whether the Philatelic investment was a security. The Petitioner points to the split in authority between the Circuits as a compelling reason for Supreme Court review. There may well be such a split in the circuits. However, that issue was not addressed either at the District Court level or by the Sixth Circuit and, therefore, may not be raised at this time.

In both the United States District Court for the Eastern District of Michigan, and the Sixth Circuit Court of Appeals, both the Plaintiffs and the Defendants acknowledged that horizontal commonality was required in the Sixth Circuit. Again, it should be noted that the Court did not hold that the Philatelic investments satisfied the commonality requirement, but rather held that it was not impossible for the Plaintiffs to satisfy this burden at trial.

It is axiomatic that issues not raised below cannot be raised for the first time before an appellate court, especially the United States Supreme Court. *New York Dock Co.* v. *S.S. Poznan*, 274 U.S. 117, 71 L.Ed. 955, 47 S.Ct. 482 (1927); *Adams* v. *Mills*, 286 U.S. 397, 76 L.Ed. 1184, 52 S.Ct. 589 (1932); *Minnich* v. *Gardner*, 292 U.S. 48, 73 L.Ed. 1116, 54 S.Ct. 567 (1934); *Lynch* v. *United States*, 292 U.S. 571, 73 L.Ed. 1434, 54 S.Ct. 840 (1934); *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 79 L.Ed. 264, 55 S.Ct. 127, 35-1 U.S.T.C. Para 9003, 14 AFTR 688 (1934); *Prudence Co.* v. *Fidelity & Deposit Co.*, 297 U.S. 198, 80 L.Ed. 581, 56 S.Ct. 387 (1936); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 89 L.Ed. 273, 65 S.Ct. 297, 64 U.S.P.Q. 7 (1945). Therefore, this Court should not grant certiorari review of the commonality issue.

CONCLUSION

This case is not one which the United States Supreme Court should consider hearing — at least not yet. In the unlikely event that the Supreme Court decides that the issues presented in the Petitions Writ of Certiorari are worthy of its consideration, this Court should examine these issues after a proper record has been established pursuant to normal discovery and trial. Therefore, the Respondents request that this Court deny the Writ of Petition for Certiorari.

Respectfully submitted,

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